

2008

# Endre' Glenn and Margret Glenn v. Robin Reese and Judith Reese : Brief of Appellee

Utah Supreme Court

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Karra J. Porter; Christensen & Jensen; Attorneys for Appellees.

Jason K. Nelson; Rinehart, Fetzer, Simonsen & Booth; Attorneys for Appellants.

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**IN THE UTAH SUPREME COURT**

---

ENDRÉ GLENN and MARGRET  
GLENN,

Appellants,

vs.

ROBIN REESE and JUDITH REESE,

Appellees.

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Case No. 20080861

APPEAL FROM AN ORDER  
OF THE HON. SAMUEL MCVEY  
FOURTH JUDICIAL DISTRICT COURT  
IN AND FOR UTAH COUNTY, STATE OF UTAH

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**BRIEF OF APPELLEES**

---

Karra J. Porter, 5223  
CHRISTENSEN & JENSEN, P.C.  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101  
Telephone: (801) 323-5000  
Attorneys for Appellees

Jason K. Nelson  
RINEHART FETZER SIMONSEN & BOOTH, P.C.  
50 West Broadway, Suite 1200  
Salt Lake City, Utah 84101  
Telephone: (801) 328-0266  
Attorneys for Appellants

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Karra J. Porter, 5223  
CHRISTENSEN & JENSEN, P.C.  
15 West South Temple, Suite 800  
Salt Lake City, Utah 84101  
Telephone: (801) 323-5000  
Attorneys for Appellees

Jason K. Nelson  
RINEHART FETZER SIMONSEN & BOOTH, P.C.  
50 West Broadway, Suite 1200  
Salt Lake City, Utah 84101  
Telephone: (801) 328-0266  
Attorneys for Appellants

## **LIST OF PARTIES TO THE PROCEEDING**

All parties to the proceeding are identified in the caption on appeal.

## TABLE OF CONTENTS

|   |    |
|---|----|
| JURISDICTION .....  | 1  |
| STATEMENT OF ISSUES .....   | 1  |
| CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES .....  | 2  |
| STATEMENT OF THE CASE.....  | 3  |
| Nature of case, course of proceedings, and disposition below .....  | 3  |
| Facts.....  | 3  |
| SUMMARY OF ARGUMENT .....   | 11 |
| I.    THE UNAMBIGUOUS WORDING OF SECTION 8 OF THE REPC<br>ALLOWED BUYERS TO CANCEL THE CONTRACT UNDER THE<br>UNDISPUTED FACTS. ....   | 13 |
| II.   ALTHOUGH BOTH PARTIES ACKNOWLEDGE THAT SECTION 2.4 DID<br>NOT APPLY TO SELF-FINANCING BUYERS, BUYERS<br>SUBSTANTIALY COMPLIED WITH 2.4 IN ANY EVENT. ....                                       | 26 |
| III.  BUYERS ARE ENTITLED TO JUDGMENT (AND ATTORNEY FEES) AS<br>A MATTER OF LAW IF THE COURT AGREES WITH THEIR<br>INTERPRETATION OF THE REPC.  HOWEVER, THE CONVERSE IS<br>NOT TRUE FOR SELLERS. .... | 28 |
| CONCLUSION.....   | 30 |

## TABLE OF AUTHORITIES

### Cases

|  |       |
|--|-------|
| <i>Archuleta v. Hughes</i> , 969 P.2d 409 (Utah 1998) .....  | 30    |
| <i>Blue Cross of Southwestern Virginia v. McDevitt &amp; Street Co.</i> , 360 S.E.2d 825 (Va. 1987) .....  | 23    |
| <i>Bowen v. Olsen</i> , 476 P.2d 862 (Utah 1978).....  | 29    |
| <i>Burgess v. North Bend School Dist. 13</i> , 216 Or.App. 510, 173 P.3d 1271 (2007).....                  | 17    |
| <i>Century 21 All Western Real Estate and Investment Inc. v. Webb</i> , 645 P.2d 52 (Utah 1982).....       | 28    |
| <i>De Freitas v. Cote</i> , 342 Mass. 474, 174 N.E.2d 371 (1961) .....                                     | 16    |
| <i>Don Houston, M.D., Inc. v. Intermountain Health Care, Inc.</i> , 933 P.2d 403<br>(Utah App. 1997) ..... | 1     |
| <i>Fairbourn Commercial, Inc. v. American Housing Partners Inc.</i> , 2004 UT 54, 94 P.3d 292 ....         | 1, 14 |
| <i>Fulwiler v. Beddoe</i> , 38 Or. App. 279, 589 P.2d 1197 (1979).....                                     | 17    |
| <i>Kelley v. Leucadia Financial Corp.</i> , 846 P.2d 1238 (Utah 1992) .....                                | 16    |
| <i>Loda v. H. K. Sargeant &amp; Assoc., Inc.</i> , 188 Conn. 69, 448 A.2d 812 (1982) .....                 | 16    |
| <i>McDermott v. Burpo</i> , 663 S.W.2d 256 (Mo. Ct. App. 1984).....  | 18    |
| <i>Norton v. Herron</i> , 677 P.2d 877 (Alaska 1984).....  | 18    |
| <i>Reliance Ins. Co. v. Utah Dep't of Transp.</i> , 858 P.2d 1363 (Utah 1993) .....                        | 27    |
| <i>Renouf v. Martini</i> , 577 S.W.2d 803 (Tex. Civ. App. 14th Dist. 1979).....                            | 16    |
| <i>Ross v. Eichman</i> , 129 N.H. 477, 529 A.2d 941 (1987) .....   | 18    |
| <i>Scott v. Majors</i> , 1999 UT App 139, 980 P.2d 214 .....   | 25    |
| <i>Tangren Family Trust v. Tangren</i> , 2008 UT 20, 182 P.3d 326 .....                                    | 1     |
| <i>Warburton v. Virginia Beach Federal Sav. &amp; Loan Ass'n</i> , 899 P.2d 779 (Utah App. 1995).....      | 14    |

### Statutes

|  |      |
|--|------|
| Utah Code Ann. § 61-2-11 .....         | 20   |
| Utah Code Ann. § 61-2-20 .....         | 2, 4 |
| Utah Code Ann. § 78A-3-102(3)(j) ..... | 1    |

### Other Authorities

|  |    |
|--|----|
| <i>Black's Law Dictionary</i> 1281 (5th ed. 1979)..... | 27 |
|--|----|

### Rules

|                                 |   |
|---------------------------------|---|
| Utah Admin. R. 162-6-2.1.2..... | 4 |
| Utah Admin. R. 6.2.1.3 .....    | 4 |

## **JURISDICTION**

The Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j).

## **STATEMENT OF ISSUES**

Issue No. 1: Whether Section 8 of the Real Estate Purchase Contract unambiguously allowed Buyers to cancel the contract under the undisputed facts.

Standard of review: Whether a contract is unambiguous is a question of law reviewed for correctness. *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 10, 182 P.3d 326. Questions of contract interpretation that are confined to the language of the contract itself are questions of law, which the Court reviews for correctness. *Fairbourn Commercial, Inc. v. American Housing Partners Inc.*, 2004 UT 54, ¶ 6, 94 P.3d 292.

Preservation: This issue was preserved in the parties' cross-motions for summary judgment. (R. 185-186, R. 198-200, R. 210-211.)

Issue No. 2: In the alternative, whether Buyers substantially complied with Section 2.4 of the REPC in canceling the contract.

Standard of review: Questions of contract interpretation that are confined to the language of the contract itself are questions of law, which the Court reviews for correctness. *Fairbourn Commercial, Inc. v. American Housing Partners Inc.*, 2004 UT 54, ¶ 6, 94 P.3d 292. Application of the doctrine of substantial compliance to undisputed facts is a question of law. *Don Houston, M.D., Inc. v. Intermountain Health Care, Inc.*, 933 P.2d 403, 409 (Utah App. 1997).

Preservation: This issue was preserved in the parties' cross-motions for summary judgment. (R. 106-109, R. 180-182, R. 210-211.)

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

There are no constitutional provisions, statutes, or rules that are determinative of the issues in this appeal. The following statute and regulations are cited in the Brief:

Utah Code Ann. § 61-2-20:

Except as provided in Subsection (2) [not applicable here], a real estate licensee may fill out only those legal forms approved by the commission and the attorney general, and those forms provided by statute.

Utah Admin. R. 162-6-2.1:

6.2.1. Approved Forms. The following standard forms are approved by the Utah Real Estate Commission and the Office of the Attorney General for use by all licensees:

(a) August 5, 2003, Real Estate Purchase Contract (use of this form shall be mandatory beginning January 1, 2004);

\* \* \*

(f) August 5, 2003, Addendum to Real Estate Purchase Contract;

\* \* \*

6.2.1.3. Additional Forms. If it is necessary for a licensee to use a form for which there is no state-approved form, for example a lease, the licensee may fill in the blanks on any form which has been prepared by an attorney, regardless of whether the attorney was employed for the purpose by the buyer, seller, lessor, lessee, brokerage, or an entity whose business enterprise is selling blank legal forms.



## STATEMENT OF THE CASE

### *Nature of case, course of proceedings, and disposition below*

Sellers Endré and Margaret Glenn (hereinafter “Sellers”) brought this action in the Third District Court against Buyers Robin and Judith Reese (hereinafter “Buyers”) and the Buyers’ real estate agents, claiming breach of the express and implied covenants of a Real Estate Purchase Contract. (R. 23, *Glenn v. Martindale, et al.*, Case No. 080904242.) Because one of the defendants is a sitting judge in the Third District, the case was transferred to the Fourth District. (R. 25.)

Sellers subsequently filed an Amended Complaint asserting claims only against the Buyers, and seeking specific performance of the REPC. (R. 41-68.) Prior to discovery, cross motions for summary judgment were filed by the parties (R. 82, R. 123). At oral argument, the trial court stated a belief that the provisions of the REPC were ambiguous. (R. 241, Tr. 38, 43-45.) Accordingly, on October 2, 2008, the court entered an order denying both parties’ motions. (R. 225, attached as Add. Exh. 1 hereto.) Sellers timely filed a petition for interlocutory appeal, which this Court granted.

### *Facts*

In the parties’ briefing below, Sellers’ and Buyers’ statements of facts were largely undisputed. The following is a summary of evidence in the record that was uncontroverted:

In 2007, Buyers were looking for a new home. In April 2007, they became interested in a property at 742 East Verona Meadows Court (hereinafter “the Verona Meadows” property). Buyers submitted an offer, which was rejected by Sellers because it

was contingent upon Buyers selling their existing home. Buyers did not pursue the purchase further at that time. (R. 160-161.)

By mid-December 2007, Buyers had lined up a purchaser for their existing home. The Verona Meadows property was still on the market, and Buyers decided to make another offer. (R. 160 ¶ 3.) On December 19, 2007, Buyers, through their real estate agent, Jodi Hansen, submitted a written offer to purchase the Verona Meadows property at a purchase price of \$540,000.00. (R. 173.)

Buyers' initial offer was conveyed by way of a completed Real Estate Purchase Contract (REPC). (R. 164-173, attached hereto as Appendix 1.) A "REPC" is a uniform, pre-printed form approved by the Utah Real Estate Commission and the Office of the Attorney General for use in residential transactions by all licensed real estate agents in the state. *See* Utah Code Ann. § 61-2-20.<sup>1</sup>

Two sections of the REPC are principally at issue in this appeal. Section 2.4 provides:

2.4 APPRAISAL CONDITION. Buyer's obligation to purchase the Property [X] IS conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition".

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<sup>1</sup> The purpose of State-mandated forms is to enable real estate agents to fill out the forms on behalf of their clients without engaging in the unauthorized practice of law. *See* Utah Admin. R. 162-6-2.1.2 through -.4. Thus, agents' ability to use documents other than the state-approved forms is limited to forms drafted by an attorney. *See* Utah Admin. R. 6.2.1.3 ("Additional Forms. If it is necessary for a licensee to use a form for which there is no state-approved form, for example a lease, the licensee may fill in the blanks on any form which has been prepared by an attorney, regardless of whether the attorney was employed for the purpose by the buyer, seller, lessor, lessee, brokerage, or an entity whose business enterprise is selling blank legal forms.").

If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer.

(R. 172, Add. Exh. 2, p. 2 of 6.)

Section 8 and its subparts provide:

8. BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS. Buyer's obligation to purchase under this Contract (check applicable boxes):

- (a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
- (e) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)  
Any other deemed necessary by buyers

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations and Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluation & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

(See R. 171, Add. Exh. 2 hereto, p. 3 of 6; underlining in original.)

The Evaluations & Inspections Deadline referenced in Section 8, and the Appraisal Deadline contemplated in Section 2.4, were both January 5, 2008. Closing was scheduled for January 10, 2008. *Id.*, §24(c).

Buyers' offer indicated that Buyers contemplated financing the purchase with \$410,000 in cash (including the earnest money deposit) and a conventional loan of \$130,000

from a lender. (R. 173.) Buyers' real estate agent, Ms. Hansen, was also a full-time employee of Infinity Mortgage, from whom Buyers anticipated obtaining a loan if needed. (R. 159 ¶ 8.)

On December 18, 2007, Ms. Hansen sent the REPC offer to Sellers' agent. (R. 153 ¶ 4.) That same evening, Sellers signed a counteroffer in the form of "Addendum No. 2 to Real Estate Purchase Contract." (R. 166, Add. Exh. 2.) Sellers' counteroffer increased the Earnest Money deposit and declined to contribute to Buyers' closing costs, but did not change any of the other terms of the offer. (R. 166.) On December 20, 2007, Buyers signed Addendum No. 2, accepting the counteroffer. (R. 3.)<sup>2</sup>

On December 27, 2007, after the intervening holiday, Buyers' agent ordered an appraisal of the property from JMS Group Appraising. (R. 153 ¶ 5.) The appraiser, Cory Bagozzi, went out to the Verona Meadows property, which was unoccupied, that same day. Mr. Bagozzi completed his formal appraisal and transmitted it electronically to Ms. Hansen the next day, December 28, 2007. (R. 148, R. 153 ¶ 5, R. 157 ¶ 3.)

Mr. Bagozzi's appraisal came back at \$80,000 below Sellers' asking price. (R. 143.) On December 28, 2007, the same day that she received the appraisal, Buyers' agent Ms. Hansen submitted to Sellers' agent an "Addendum No. 3" signed by Buyers. (R. 153 ¶ 6.) Addendum 3 stated:

1. Purchase price to be \$460,000 per appraised value.
2. If seller does not agree to the new purchase price contract will be canceled.

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<sup>2</sup> For the Court's convenience, and because the subsequent addenda incorporate the original REPC terms and deadlines, the initial REPC offer and the three subsequent addenda thereto are attached hereto as a single exhibit, Addendum Exhibit 2.

2 [sic]. Earnest Money to be returned to Buyers.

(R. 165, Add. Exh. 2.)

Addendum 3 stated that the contract deadlines referenced in Section 24 of the REPC, which included the January 5 appraisal / evaluation deadlines and the January 10 closing date, would remain unchanged. (R. 165.) The addendum gave Sellers until 6 p.m. on December 29, 2007, to accept. (R. 165.)

At the appraised value, Buyers determined that they would be able to finance the entire purchase in cash, and would not need a loan. (R. 159 ¶ 8.) Had they applied for a loan, they would have done so through their agent's employer, Infinity Mortgage, which utilized the same appraiser. (R. 158 ¶ 5, R. 159 ¶¶ 8-9.) Because Buyers arranged for the appraisal personally and would be self-financing the purchase, no "Notice of Appraised Value" (defined in Section 2.4 of the REPC as written notice from the Lender that the Property has appraised for less than the Purchase Price) was received by Buyers.

Sellers did not respond to Addendum 3 within the stated deadline. On December 31, 2007, Buyers' agent confirmed that Sellers' agent had submitted Addendum 3 to the Glenns, and had not received a response. (R. 153 ¶ 7.) Buyers then signed, and their agent submitted, an "Addendum No. 4," which stated:

1. Seller has failed to respond to addendum #3. Buyers are canceling this contract based upon the appraised value coming in at 460,000 and the seller not accepting the value as the purchase price.

2. Earnest money of \$5000.00 to be released to Buyers.

(R. 164.)

On January 2, 2008, Sellers' broker (Coldwell Banker) placed the Verona Meadows property back on active status in the Multiple Listing Service. (R. 153 ¶ 9.) On January 4, 2008, Buyers' agent received the Earnest Money Release form from Sellers' broker with the handwritten statement, "Broker signature NOT required as per REPC. Money to be released per appraisal contingency 2.4(E)," followed by the broker's signature. (R. 133.) (There is no paragraph 2.4 E in the REPC, but paragraph 24(E) set the appraisal deadline at January 5, 2008.)) (R. 182-183.)

On January 9, 2008, Sellers' broker sent an e-mail to Buyers' agent requesting for the first time a copy of the appraisal. (R. 131, R. 152 ¶ 11; Brief of Appellant, p. 7.) Buyers' agent testified that she sent a copy of the appraisal to Sellers' broker on January 14, 2008. (R. 152 ¶ 12.) Sellers apparently deny receiving a copy of the appraisal prior to filing the lawsuit. (R. 285.)

In February 2008, Buyers found and purchased another home. (R. 159 ¶ 9, R. 156 ¶ 5.) On March 11, 2008, Sellers filed the underlying lawsuit against Buyers and Buyers' real estate agent, seeking a return of the \$5,000.00 earnest money. (R. 23.) On May 22, 2008, Sellers filed an Amended Complaint naming only Buyers as defendants. The amended complaint eliminates the request for the earnest money, and instead seeks specific performance of the contract. (R. 41.)

On July 7, 2008, Sellers filed a motion for summary judgment. Sellers argued that buyers who self-finance the purchase of a home cannot cancel a REPC under Section 2.4 because their notice of appraised value comes from an appraiser directly, rather than a "Lender." (R. 202.) Sellers further argued that an appraisal cannot constitute a form of

“evaluation” to which Buyers were entitled under Section 8 and, accordingly, that there is no provision in the REPC that allows self-financing buyers to cancel a contract based upon an unsatisfactory appraisal. (R. 199-202.)

Sellers also argued that, if Section 8 did apply, buyers who are dissatisfied with an appraisal must cancel without giving sellers an opportunity to reduce their price first or else waive their right to cancel, even if the buyer notifies the seller of cancellation prior to the Evaluations & Inspections deadline. (R. 198-199.)

In response, Buyers agreed that Section 2.4 does not appear to apply to buyers who self-finance, because there is no “Lender” who can issue a “Notice of Appraised Value.” Buyers argued, however, that they were entitled to cancel under Section 8, which gave Buyers a right to cancel for any unsatisfactory test or evaluation deemed necessary by Buyers. Buyers argued that they did not waive this entitlement by attempting to give Sellers an opportunity to re-negotiate, because they exercised their right to cancel before the January 5 deadline. (R. 183-186.) Alternatively, Buyers argued that they substantially complied with the requirements of Section 2.4 of the REPC. (R. 180-187.) Other contentions raised by the parties below, to the extent they are pertinent to the issues on appeal, are addressed *infra*.

The court held oral argument, at which it denied both parties’ motions for summary judgment. Although the judge indicated at the hearing that he considered the REPC ambiguous, he did not make any formal “rulings” other than a determination that the cross-motions should be denied. (*See* Add. Exh. 1.)



## **SUMMARY OF ARGUMENT**

Section 8 of the REPC unambiguously afforded Buyers the right to cancel the contract if they were dissatisfied with “any” “evaluation” they deemed necessary. The plain and ordinary meaning of “evaluation” includes an appraisal, which is also consistent with the context of Section 8 and the scope of the appraisal itself.

Buyers’ argument does not render either Section 2.4 or Section 8 redundant, because they simply apply to two different situations: Section 2.4 applies when third-party lender is involved; Section 8 applies when a buyer self-finances. There is no conflict between the two.

Sellers’ contention that Buyers were required to obtain third-party financing, and therefore were required to comply with Section 2.4, has been consistently rejected by courts in other jurisdictions. Third-party financing provisions in a REPC are solely for a buyer’s benefit, and therefore can be waived by the buyer. If Sellers wanted to ensure that Buyers were subject to Section 2.4 by requiring third-party financing, they should have requested a provision to that effect in the contract.

Sellers’ contention that, because Section 2.4 is inapplicable to self-financing buyers, there is no means by which such buyers may cancel for a low appraisal is not reasonable. Such an interpretation would discourage self-financing, which is socially beneficial, and ignores Section 2.4’s recognition that other provisions of the contract may apply to cancellations based upon appraisals.

Because the two sections are mutually exclusive in these circumstances, Section 2.4 is not a “more specific” provision that trumps Section 8. Nor does the doctrine of

*ejusdem generis* aid Sellers, because “evaluation” is unambiguous, and because an appraisal is consistent with other types of evaluations mentioned in Section 8.

Sellers’ argument that Buyers waived their right to cancel under Section 8 by giving Sellers an opportunity to lower their price before canceling is not a reasonable interpretation of the REPC. The contract did not prohibit Buyers from making an effort to salvage the deal. Once Sellers declined the offer, the original contract terms remained in effect, pursuant to which Buyers timely canceled.

Moreover, even under their own argument, Sellers admit that Buyers could have canceled seven days after making the renegotiation overture. Sellers have neither argued nor adduced any evidence that giving them an additional four days before canceling would have made any difference. They did not ask for more time, have never claimed they would have lowered their price, did not ask for a copy of the appraisal, and their Broker acknowledged Buyers’ entitlement to return of the earnest money.

As a final matter, even if Section 2.4 had applied to these circumstances, Buyers substantially complied with that section. There is no dispute that they provided Sellers with timely and accurate information regarding the results of an appraisal, which fulfilled the purposes of the section. Sellers’ complaint that they did not receive a copy of the appraisal until after the fact is immaterial; they never requested a copy in response to the Buyers’ offer to renegotiate, and have never suggested that they would have reduced their price by the \$80,000.00 it would have taken for this deal to go through.

With respect to attorney fees, if Buyers are correct in their interpretation of the contract, they are entitled to judgment as a matter of law, which should include an award

of attorney fees on appeal. In contrast, Sellers' request for attorney fees is premature, because they face additional hurdles beyond contract interpretation in order to obtain a judgment. Among the unresolved issues: Sellers did not tender complete performance of the REPC, as required to obtain specific performance. There is a fact issue as to whether Sellers' broker was authorized to acknowledge and/or waive compliance with Section 2.4. The contract as interpreted by Sellers would be unconscionable under these facts, and Sellers could be made whole through an award of damages, rather than equitable relief. These matters are not ripe for appeal, and must be resolved in the trial court before any judgment could be obtained by Sellers.

#### **ARGUMENT**

#### **I. THE UNAMBIGUOUS WORDING OF SECTION 8 OF THE REPC ALLOWED BUYERS TO CANCEL THE CONTRACT UNDER THE UNDISPUTED FACTS.**

##### **A. The Bagozzi appraisal was an "evaluation" for purposes of Section 8.**

Section 8 of the REPC states:

8. BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS. Buyer's obligation to purchase under this Contract . . .

(e) [IS] conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) Any other deemed necessary by buyers.

(Underlining in original.)

If the Bagozzi appraisal constituted a form of "evaluation" of the property under Section 8, there is no dispute that Buyers were entitled to cancel the REPC, as long as they did so by January 5, 2008, the Evaluations & Inspections Deadline. (*See* R. 241, Tr. 31:2-

16 (Glenns' counsel: "If a buyer determines that the evaluations and inspections are unacceptable, buyer – no later than the deadline – can either cancel the contract or give written notice of the objections.".) The key issue on appeal, therefore, is whether the appraisal constitutes a form of evaluation.<sup>3</sup>

Contract language is to be construed in accordance with its plain and ordinary meaning. *Fairbourn Commercial, Inc. v. American Housing Partners Inc.*, 2004 UT 54, ¶ 11, 94 P.3d 292. The plain and ordinary meaning – literally, the dictionary definition – of the word "evaluate" is to determine value, *i.e.*, "to appraise." See *The American Heritage College Dictionary* (4th ed. 2002) (to evaluate is "1. To ascertain or fix the value or worth of. 2. To examine and judge carefully; appraise."); *Webster's New Twentieth Century Dictionary* (2d ed. 1979) (to evaluate is "to determine the worth of; to find the amount or value of; to appraise."). See *Warburton v. Virginia Beach Federal Sav. & Loan Ass'n*, 899 P.2d 779, 783 (Utah App. 1995) (the ordinary meaning of contract terms is often best determined through standard, non-legal dictionaries).

*Roget's* lists "appraisal" as a synonym of "evaluation." *Roget's 21st Century Thesaurus* (3rd ed. 2009). The Bagozzi appraisal itself says that the "[t] intended use of this appraisal report is for the lender / client to evaluate the property that is the subject of this appraisal for a mortgage finance transaction." R. 145 (emphasis added).

Sellers acknowledge that, "[i]f Section 8 of the REPC is read in isolation, then Buyers' interpretation of Section 8 could be reasonable." (Brief of Appellant, p. 13.)

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<sup>3</sup> Sellers' argument that Buyers waived this right by offering a renegotiation before the cancellation deadline is addressed *infra*.

Sellers argue, however, that the interpretation becomes unreasonable if Section 8 is interpreted as “a piece of a greater whole.” *Id.* According to Sellers, Buyers “would have this Court believe that Section 2.4 is merely redundant with Section 8 insofar as appraisals are concerned and, because the application of Section 2.4 yields unfavorable results for Buyers, Section 2.4 should be given no effect.” (*Id.*, p. 14.)

Sellers have incorrectly characterized Buyers’ argument. Buyers do not claim that Section 2.4 and Section 8 are “redundant” when it comes to appraisals. Buyers contend that Section 2.4 applies to appraisals that are procured by a third party lender, and that Section 8 applies to appraisals that are procured directly by a self-financing buyer.

Throughout this lawsuit, it has been Sellers’ contention that Section 2.4 did not apply because Buyers intended to self-finance, and therefore no lender was involved, and therefore no Notice of Appraised Value was or could be obtained from a Lender as contemplated by Section 2.4. (*See* R. 106-107, R. 200-202, R. 241 Tr. 6 (“I think that there’s just no dispute that 2.4 does not apply”); Brief of Appellant, p. 12.) Buyers happen to agree. On its face, Section 2.4 did not apply to a self-funded purchase.

The only area of disagreement is whether the inapplicability of Section 2.4 leaves a self-financing buyer with no way to cancel due to a low appraisal (Sellers’ position), or whether there is another provision of the contract that allows cancellation for a low appraisal that is procured by the Buyer directly (Buyers’ position).<sup>4</sup>

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<sup>4</sup> This particular dispute has largely been eliminated in the materially rewritten REPC that went into effect January 1, 2009. Among other things, the new REPC eliminates Section 2.4, moves the “appraisal” condition to Section 8, clarifies that buyers can cancel based upon either Lender-procured or personally procured appraisals, etc. (*See* Add. Exh. 3.)

In this appeal, Sellers argue that Section 2.4 was the only means by which a low appraisal could permit termination of the contract, and that it was the Buyers' own fault that they could not invoke Section 2.4 because they "failed" to apply for a loan, which would have given them a Lender, which would have allowed for a Notice of Appraised Value to be generated as required by Section 2.4. (Brief of Appellant, pp. 6, 12-14.)

This contention has a fatal defect in that it erroneously assumes that Buyers had some legal obligation to use third-party financing, and that "failing" to do so was a breach of the REPC. No authority is cited for that proposition, and with good reason: Virtually all courts to address the issue have ruled that, even if a contract specifies a particular form of financing (usually a third-party loan), such a provision is purely for the buyer's benefit, and cannot be enforced by a seller. *See Kelley v. Leucadia Financial Corp.*, 846 P.2d 1238, 1242 (Utah 1992) ("A seller is not entitled to take advantage of a provision intended to benefit the buyer alone").

Applying this widely recognized principle, courts have consistently held that terms-of-financing provisions in real estate contracts may be waived unilaterally by buyers. *See, e.g., Loda v. H. K. Sargeant & Assoc., Inc.*, 188 Conn. 69, 448 A.2d 812, 816-817 (1982) (financing contingency was "a condition precedent imposed for the protection and benefit of the [buyers]" and could be waived; sellers had "no ascertainable interest" in financing terms obtained by buyers), and numerous cases cited; *Renouf v. Martini*, 577 S.W.2d 803, 804 (Tex. Civ. App. 14th Dist. 1979) ("well settled" in Texas that financing conditions are solely for the benefit of the purchasers); *De Freitas v. Cote*, 342 Mass. 474, 174 N.E.2d 371 (1961) ("The language found later on in the agreement that 'this sale is subject to a G.I.

Loan and in the event that said amount is not approved, the deposit will be returned in full’ was a condition inserted in the contract for the benefit of the buyer and as such could be waived by the buyer. . . . It would be of no import to the [sellers] whether the buyer was offered a G. I. loan if the buyer was still able to tender the full purchase price”), and authorities cited.

In *Burgess v. North Bend School Dist. 13*, 216 Or.App. 510, 173 P.3d 1271 (2007), a seller argued that the buyer breached a real estate contract by failing to apply for a loan within the 10-day period specified in the contract, even though the buyer was able to arrange other financing prior to the closing date. The appellate court rejected the seller’s contention, finding that, even assuming that a breach occurred, it was not material:

The failure of plaintiffs to submit a written loan application within 10 business days did not deprive defendant of any contractual benefit because the loan-contingency clause that included the 10-day requirement was solely for plaintiffs’ benefit. The benefit for which defendant contracted, the timely sale of the property, would have been satisfied if the funds to complete the purchase were available by the closing date, regardless of when plaintiffs completed their loan application.

*Id.*

In this case, Buyers recommitted themselves in Addendum 3 to meeting all remaining deadlines, including the January 10 closing. Accordingly, it was immaterial when or if they applied for a third-party loan. Buyers are allowed to “come up with” the money however they choose, as long as they are prepared to proceed at the closing.

*Fulwiler v. Beddoe*, 38 Or. App. 279, 589 P.2d 1197, 1199 (1979) (buyers’ alleged failure to comply with loan application and terms contingencies would not afford basis for seller to claim breach; buyers “were either going to ‘come up’ with the money on September 1, the

day for performance, or they were not.”); *Ross v. Eichman*, 129 N.H. 477, 529 A.2d 941, 943-944 (1987) (it is not necessary for buyers to obtain the particular financing set forth in a real estate contract, as long as buyers are able to obtain financing and to close the transaction; source-of-financing clauses are for the buyer’s protection and can be unilaterally waived ); *McDermott v. Burpo*, 663 S.W.2d 256, 260 (Mo. Ct. App. 1984) (buyer was entitled to pay cash and forego FHA loan contingency), and cases cited.

If Sellers wished to condition the sale of their property on a particular type of financing instead of paying cash, they could have added the word “only,” or insisted on third-party financing as a condition enforceable for their own benefit. *See Ross*, 529 A.2d at 944 (if sellers wanted to insist that financing be obtained through a third-party lender, “they merely had to make this clear by adding a provision to the contract requiring that an institutional lender be committed to the buyer by a date certain”) (emphasis in original); *Norton v. Herron*, 677 P.2d 877, 882 (Alaska 1984) (seller who wanted to limit source of buyer’s financing should have included the word “‘only,’ or a word or words of similar clarity”; otherwise, financing contingency merely refers to “probable” source of funds), and cases cited.

Sellers did not request any such restrictions in this case. Accordingly, they assumed the risk that Buyers would opt out of third-party financing, and thereby, by Sellers’ own acknowledgement, render inapplicable Section 2.4.

With Section 2.4 inapplicable by its terms (and by Sellers’ own contention) to self-financing buyers, the only issue is whether there is any other provision of the REPC that



allows self-financing buyers to cancel a contract based upon an unsatisfactory appraisal.

Sellers say that there is not.

There are several problems with Sellers' position. First, it would lead to irrational results. Barring self-financing buyers from canceling a contract due to a low appraisal would strongly discourage self-financing, which is not in anyone's interest. Self-financing enables buyers to reduce their debt. It allows sales to occur when credit is tight or lenders are failing. An interpretation that penalizes a buyer for being fiscally responsible is simply unreasonable.

Sellers claim that a "conflict" would arise if appraisals can fall within the provisions of both Section 2.4 and Section 8. (Brief of Appellant, p. 15.) But there is no such conflict. Section 2.4 governs appraisals obtained by third-party lenders. Section 8 governs appraisals obtained by the Buyer directly, *i.e.*, by a self-financing buyer.

Section 2.4 itself recognizes that it is not the only paragraph that may authorize cancellation of the contract due to an appraisal. It states: "Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions." This sentence, placed in the "appraisal condition" paragraph, is a recognition that there will be situations involving appraisals that do not fall within the parameters of section 2.4.

Sellers argue that an appraisal should not be considered an evaluation because Section 2.4 "is the more specific of the two provisions when it comes to the issue of appraisals." (Brief of Appellant, p. 15.) All parties agree, however, that Section 2.4 does not apply to self-financing purchasers. A provision that does not even apply to a situation cannot be a more specific provision.

Sellers argue that reading Section 8 as Buyers contend would render meaningless Sellers' "contractual right in Section 2.4 to receive written notice from a third party (i.e. the Lender) concerning the appraised value of the Property," and that a theoretical self-financing buyer might fail to provide notice of an appraisal within the three days that Section 2.4 provides for Lender-procured appraisals. (Brief of Appellant, pp. 14-15, 29-30.)

Of course, contracts allow what they allow. However, Sellers' suggestion that they had a "right" to "receive written notice from a third party," rather than rely on the word of the Buyers and their agent, is not supported by the contract. As discussed above, if Sellers wanted an enforceable requirement of third-party financing, they should have sought one. They did not, and cannot seek to add such a condition now.<sup>5</sup>

With respect to timing of the notice of appraisal, Sellers do not explain what incentive that buyers (or their agents, who are anticipating a commission) would have to delay unnecessarily. In this case, for example, notice of the low appraisal was provided by Buyers and their agent the same day the appraisal was received. Sellers' argument also

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<sup>5</sup> The implicit assumption in Sellers' argument (that Buyers and their agents are wont to misstate the results of an appraisal) seems unreasonable, both generally and under these facts. In this case, Sellers knew that Buyers' agent was legally prohibited from misrepresenting the results of an appraisal that she procured for her clients. *See* Utah Code Ann. § 61-2-11 (it is unlawful for a real estate agent to make any substantial misrepresentation). They were also familiar with these particular Buyers. (R. 88.) There was no reason for Sellers to assume that something so easily (dis)proved as the results of a formal appraisal would be misstated by Buyers and their agent, nor do Sellers claim they actually thought that had occurred. Moreover, the assumption that obtaining a third-party lender would eliminate the potential for shady business is flawed. There was no provision in the contract specifying a particular lender. A buyer could contract with some out-of-state "financing" entity, the integrity of whose word would be equally unknown to Sellers. In any event, it is uncontroverted that the appraisal in this case was exactly as represented.

overlooks the other deadlines set forth in the REPC. Because the appraisal deadline and the evaluations & inspections deadline were the same, Buyers had to meet the same cancellation deadline regardless of whether Section 2.4 or Section 8 applied. Sellers cite no prejudice that would result from receiving a copy of an appraisal on, say, Day 4 instead of Day 3, as long as the buyer takes action before the final deadline. (The fact that Sellers' broker did not request a copy of the appraisal on January 4, when he told Buyers' agent that return of the earnest money was permitted under Section 2.4, reinforces that conclusion.)

Invoking the doctrine of *ejusdem generis*, Sellers next argue that an appraisal is not similar to other types of evaluations and tests mentioned in Section 8, and therefore it must not qualify as an "evaluation." The only type of evaluations contemplated by Section 8 are those that "directly assist in the discovery of unknown or undisclosed physical conditions and characteristics of the Property," Sellers say. (Brief of Appellant, pp. 17-18.)

If that were the case, why wouldn't the REPC start and end with Section 8(b), which mentions as one of the evaluations and inspections that may be requested "a physical condition inspection of the Property"? Section 8(e) of the REPC says that the sale was conditioned on Buyers' approval of "[a]ny" evaluation or test deemed necessary by Buyers. The breadth of these words is hard to overstate. As long as the Buyers were willing to pay for it, they were entitled to any evaluation they deemed necessary. Sellers

essentially contend that “evaluations” is co-extensive with “inspections,” but fail to explain why both words are contained in Section 8.<sup>6</sup>

Even if it were assumed that “evaluation” was limited to activities that included aspects of “inspection,” the appraisal would still qualify. Although (most) appraisers do not hold themselves out as expert home inspectors, the SCOPE OF WORK outlined in the Appraisal Report called for Mr. Bagozzi to, “at a minimum: (1) perform a complete visual *inspection* of the interior and exterior areas of the subject property, (2) *inspect* the neighborhood, (3) *inspect* each of the comparable sales from at least the street, [and] (4) research, verify, and analyze data from reliable public and/or private sectors.” R. 145 (emphasis added); *see also id.* (requiring assessment of physical condition of property, including foundation, interior and exterior conditions, needed repairs, etc.) Thus, Mr. Bagozzi determined that, “[b]ased on a complete visual *inspection* of the interior and exterior areas of the subject property . . . my opinion of the market value . . . of the real property that is the subject of this report is \$460,000. . . .” *Id.* (emphasis added).

As a final assertion, Sellers argue that any ambiguity in the state-mandated REPC should be construed against Buyers, because they “supplied” the standardized form. (Brief of Appellant, pp. 27-28.) In other words, Sellers contend that any ambiguity in Utah’s state-

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<sup>6</sup> Sellers’ argument is internally inconsistent. Surveys, one form of evaluation mentioned in Section 8, have nothing to do with undisclosed physical characteristics of property. Likewise, the cost and availability of homeowner’s insurance, another type of evaluation mentioned in Section 8, are not tests to discover unknown conditions. As Sellers acknowledge, the factors that affect insurance include visible and known factors, such as the age of a home and its construction – which, incidentally, are also evaluated in an appraisal. (Ironically, under Sellers’ position in this case, self-financing buyers could cancel a REPC upon learning that the cost of *insurance* was too high, but not upon learning that the cost of the *house* was too high.)

mandated REPC must always be construed against buyers, because it is always buyers who make the first offer, and any buyer who is represented by an agent is required to do so through a REPC.

That is a rather disturbing proposition. One goal behind a uniform REPC was to equalize the bargaining positions of sellers and buyers, not to handicap buyers on crucial issues of contract interpretation. Under Sellers' interpretation, the only way that a buyer could "choose to use another form of contract" and avoid being an automatic victim of *contra proferentem* would be by representing himself or hiring an attorney, neither of which is a reasonable expectation for a common and normally uncontroversial transaction.

The single case cited by Sellers for this proposition, *Blue Cross of Southwestern Virginia v. McDevitt & Street Co.*, 360 S.E.2d 825, 827 (Va. 1987), does not support it. *McDevitt & Street* involved a contractor who supplied a *voluntary* AIA form, not a *State-mandated* form. This argument, along with the assertion that an attorney (Buyer Robin Reese) was "one of the drafters of the contract," have no sway in a jurisdiction with a mandatory REPC.

In sum, Section 8 of the REPC: (1) is unambiguous; (2) encompassed an appraisal that was procured by a buyer, rather than a lender; and (3) permitted Buyers to cancel the contract, as long as they did so by January 5, 2008.

B. Buyers did not waive their right to cancel the agreement on or before January 5 by giving Sellers an opportunity to salvage the sale in the interim.

As noted above, on December 28, 2007, Buyers submitted Addendum 3, through which they offered to renegotiate the purchase price and avoid a cancellation. Buyers gave

Sellers 24 hours to respond to that price, advising Sellers that, “if seller does not agree to the new purchase price, contract will be cancelled.” *See* Addendum 3, line 2. After 72 hours, Buyers, having received no response from Sellers, cancelled the contract through Addendum 4. Addendum 4 was submitted to Sellers before the REPC deadline for canceling the contract.

Section 8.2 of the REPC states:

Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

Sellers argue that, even if Section 8 would have allowed Buyers to cancel the contract, they waived that right when they first gave Sellers an opportunity to lower their price. According to Sellers, the submission of an offer to renegotiate is not an outright cancellation, and therefore it can only be construed as a “written notice of objections.” (Brief of Appellant, pp. 23-24.) Under Section 8.4, if a written notice of objections is provided, the seller and buyer have seven days to reach an agreement on the objections:

Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller’s receipt of Buyer’s objections (the “Response Period”) in which to agree in writing upon the manner of resolving Buyer’s objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer’s objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer’s objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer’s objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

Sellers argue that, under Section 8.2, any response to an unsatisfactory appraisal other than an immediate cancellation must be deemed a “written notice of objections,” which allowed Sellers seven days to respond, rather than three. But the contract did not prohibit other communications prior to a cancellation. Asking whether Sellers were interested in renegotiating rather than suffer a cancellation was a socially beneficial effort not prohibited by the contract. A contrary interpretation that discourages, rather than encourages, communication between parties to a contract would seem counterintuitive.

Although there are no cases on point in Utah, the Court of Appeals’ analysis in *Scott v. Majors*, 1999 UT App 139, 980 P.2d 214 seems instructive. In that case, an order of specific performance of a REPC was entered in favor of a buyer, and affirmed on appeal. On remand, the buyer submitted a mutual release to the seller, the terms of which would have reduced the purchase price by the amount of attorney fees awarded in the case. The seller argued that, by proposing the mutual release, the buyer was repudiating the terms of the REPC, which did not include any such release.

The Court of Appeals disagreed. “Scott did not repudiate the contract but merely tried to resolve unresolved issues thereunder,” the court said. “We hold that Scott’s proposal was an offer to modify the original contract which Majors rejected, leaving the original contract in full force.” 1999 UT App 139, ¶ 18. In other words, there was no harm in asking. When the seller refused to sign the proposed release in *Scott*, the original terms of the contract remained in force. When Sellers declined to sign the proposed Addendum 3 in this case, the original terms of the contract remained in force, and the cancellation proceeded in accordance with those terms.

That conclusion is bolstered by the purpose of the seven-day negotiation provision, which is intended to give the seller time to determine whether particular objections can or should be met. If a Buyer insists on numerous repairs, for example, the seller may need bids from contractors in order to decide whether it would make financial sense. There was nothing here of that nature. The only decision to be made was whether Sellers would agree to the appraisal price, a yes-or-no question. That is not the type of “objection” contemplated by the seven-day provision.

Nor is there any evidence that another four days would have made any difference. Sellers did not ask for more time. Nor have they ever claimed that they would have lowered their price at all, let alone to \$460,000.00. (Had Sellers been inclined to reduce their price, presumably they would have done so upon receipt of the cancellation, which was based upon “seller not accepting the [appraisal] value as the purchase price.” Sellers knew that Buyers wanted this house, having tried to buy it once before.)

Section 8 did not prohibit Buyers from offering Sellers an alternative better than cancellation, and their effort was not thereby transformed into a “written notice of objections.” Even if it were so construed, however, Buyers’ actions in proceeding with the cancellation in three days rather than seven were immaterial, absent any evidence or claim by Sellers that a four-day delay would have made any difference.

**II. ALTHOUGH BOTH PARTIES ACKNOWLEDGE THAT SECTION 2.4 DID NOT APPLY TO SELF-FINANCING BUYERS, BUYERS SUBSTANTIALLY COMPLIED WITH 2.4 IN ANY EVENT.**

Substantial performance exists “where there has been no willful departure from the terms of [a] contract, and no omission in essential points, and the contract has been honestly



and faithfully performed in its material and substantial particulars.” *Black’s Law Dictionary* 1281 (5th ed. 1979). A party has substantially performed when “the only variance from the strict and literal performance consists of technical or unimportant omissions or defects.” *Reliance Ins. Co. v. Utah Dep’t of Transp.*, 858 P.2d 1363, 1379 (Utah 1993).

In this case, Buyers did not receive a document titled Notice of Appraised Value from a Lender and, obviously, did not forward such a document. However, they did provide Sellers with timely and accurate information regarding an appraisal. The purposes of Section 2.4 were thereby served.

Sellers argue, however, that Buyers cannot claim substantial compliance because Buyers breached Section 2.4 by failing to apply a loan from a third-party lender:

[Buyers] voluntarily chose to breach their obligation to apply for the Loan on or prior to December 21, 2007 as required by Section 2.3 of the REPC. If Buyers had applied for the Loan, as they were required to do by Section 2.3 of the REPC, then Buyers would have had a Lender who could have given them the Notice of Appraised Value needed to cancel pursuant to Section 2.4. Surely, the doctrine of substantial compliance cannot be utilized when the sole reason Buyers could not strictly comply with Section 2.4 was as a result of their breach of another section of the REPC.

(Brief of Appellant, p. 29.)

As pointed out above, however, Sellers’ assumption that Buyers were legally required to apply for a loan is wrong. Buyers are free to forego third-party financing as long as they are ready, willing, and able to close timely, which Buyers had already reaffirmed in Addendum 3. *See pp. 14-16, supra.*

Sellers also complain that Buyers’ agent did not give them a copy of the appraisal before the cancellation. While a copy would not have been required under Section 8, even

under Section 2.4 a failure to provide one would have been immaterial. Notably, Sellers never even asked for a copy until January 9, long after the cancellation had occurred and the earnest money had been returned. Nor did Sellers accept Addendum 3 with a contingency that they obtain a copy of the appraisal. Nor, again, have Sellers ever claimed that they would have dropped their price \$80,000.00 had they received a copy earlier. The purposes of the REPC were met under the facts of this case, and the doctrine of substantial compliance applies.

**III. BUYERS ARE ENTITLED TO JUDGMENT (AND ATTORNEY FEES) AS A MATTER OF LAW IF THE COURT AGREES WITH THEIR INTERPRETATION OF THE REPC. HOWEVER, THE CONVERSE IS NOT TRUE FOR SELLERS.**

Sellers correctly note that prevailing parties in a REPC dispute are entitled to attorney fees, including fees incurred on appeal. (Brief of Appellant, p. 30.) If the Court agrees with Buyers' interpretation of the REPC, then Buyers are entitled to judgment as a matter of law. In that event, Buyers are entitled to an award of attorney fees, which are hereby requested.

In contrast, Sellers' request for attorney fees is premature, as certain issues remain for trial even if the Court interprets the REPC as Sellers suggest. In addition to prevailing on the language of the contract, Sellers must affirmatively demonstrate that they tendered a complete performance of their own obligations under the contract. *Century 21 All Western Real Estate and Investment Inc. v. Webb*, 645 P.2d 52, 56 (Utah 1982) (party seeking specific performance of real estate contract must make a "complete and unconditional" tender of his own agreed performance).

In the Court below, Buyers argued that Sellers had not tendered complete performance, because their disclosures required under Section 7 of the REPC were incomplete in some important particulars. *See, e.g.*, R. 124-129 (failure to provide required warranties, failure to disclose source of culinary water and sewer service for the property, failure to describe known problems with equipment, failure to disclose Home Owner's Association requirements, etc.). Additionally, Sellers' Disclosures were not current; they were dated September 2007 and had not been updated. *Id.*

Sellers have thus not met their burden of proving a tender of "complete" performance, as required to place Buyers in default. Buyers also argued below that Sellers' broker acknowledged and/or waived (further) compliance with Section 2.4, including receipt of a copy of the appraisal, when he wrote on the January 4 Earnest Money Deposit Release, "Broker signature not required per REPC. Money to be released per appraisal contingency 2.4(E)."

As Sellers' agent, the broker had the authority to act on the principal's behalf. *Restatement 3d of Agency*, § 1.01. That authority carried with it the power "to do collateral acts which are the natural and ordinary incidents of the main act or business authorized." *Bowen v. Olsen*, 476 P.2d 862, 864 (Utah 1978). Sellers argue, however, that any such waiver would have exceeded the broker's authority under the Utah Administrative Code, which requires that a broker have a power of attorney before signing a document on behalf of his or her client, and that he attach a copy of the power of attorney to the document. (Brief of Appellant, pp. 28-29.)

An alleged breach of licensing regulations might subject an agent / broker to discipline. However, the regulations do not define the parameters of an agent's common law duties or authority. *See, e.g., Archuleta v. Hughes*, 969 P.2d 409, 413 (Utah 1998) (violation of Rules of Professional Conduct did not provide a basis for malpractice liability; the rules are for the regulation of attorneys, not to establish tort duties).

An alleged violation of a licensing regulation does not automatically invalidate a transaction. Under the administrative code, agents cannot use "white out" on a counteroffer (Utah Admin. R. 162-6-1.13), but no one would suggest that doing so would void an offer that the agent was otherwise authorized to convey. An issue of fact exists in this case regarding the agent's authority to acknowledge or waive compliance with Section 2.4.

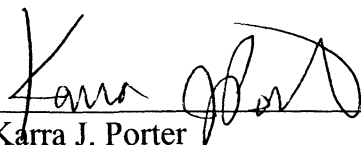
Buyers also argued below that specific performance was unavailable because damages would be adequate, that equitable relief was not warranted, and that the contract as interpreted by Sellers would be unconscionable under these facts. (R. 176-177.) Absent resolution of these issues, Sellers are not entitled to judgment, regardless of the Court's interpretation of the contract language. Accordingly, Sellers' request for attorney fees, which presupposes a judgment in their favor, must be denied.

## **CONCLUSION**

For the reasons set forth above, Buyers (Robin and Judith Reese) respectfully request that the Court reverse the trial court, and direct the trial court to enter judgment as a matter of law in favor of Buyers. Buyers also request their attorney fees on appeal.

DATED this 9<sup>th</sup> day of April, 2009.

CHRISTENSEN & JENSEN, P.C.

  
\_\_\_\_\_  
Karra J. Porter  
Attorneys for Appellees

CERTIFICATE OF SERVICE

This is to certify that on the 9<sup>th</sup> day of April, 2009, two true and correct copies  
of the foregoing BRIEF OF APPELLEE were mailed, first-class postage prepaid, to:

Jason K. Nelson  
RINEHART FETZER SIMONSEN & BOOTH, P.C.  
50 West Broadway, Suite 1200  
Salt Lake City, Utah 84101  
*Attorneys for Appellants*

CHRISTENSEN & JENSEN, P.C.

  
\_\_\_\_\_  
Karra J. Porter  
Attorneys for Appellees

## **ADDENDUM**

1. Order dated October 2, 2008
2. Real Estate Purchase Contract and Addenda
3. 2009 Real Estate Purchase Contract form

Exhibit 1    Order dated October 2, 2008

Walter T. Keane #10333  
WALTER T. KEANE, P.C.  
2150 South 1300 East, Suite 500  
Salt Lake City, Utah 84106  
Phone: 801-990-4422  
Fax: 801-606-7533  
Email: Walter@WalterTKeane.com  
Attorney for Plaintiffs

FILED  
2008  
CLERK OF DISTRICT COURT  
UTAH COUNTY

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR  
UTAH COUNTY – PROVO COURTHOUSE, STATE OF UTAH**

|   |  |
|---|--|
| ENDRE' GLENN and MARGRET<br>GLENN<br><br>Plaintiffs,<br><br>vs.<br><br>ROBIN REESE and JUDITH REESE,<br><br>Defendants. | <b>[PROPOSED] ORDER</b><br><br>Case No: 080400977<br><br>Judge: Samuel McVey |
|---|--|

This matter coming to be heard on cross motions for summary judgment, all parties present by and through their counsel, the Court being fully informed and after considering oral argument, motions and memoranda, IT IS HEREBY ORDERED.

1. That the both the plaintiffs' and the defendants' motions for summary judgment are denied.

DATED this 2 day of October, 2008

BY THE COURT:

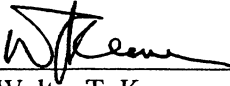
  
HONORABLE SAMUEL MCVEY



*Certificate of Service*

I certify that on 8/25 2008, I caused a copy of the foregoing Memorandum in Support of Summary Judgment to be mailed and emailed to the following:

Alain Balmano  
Hutchings, Baird, Curtis & Astill, PLLC  
9537 South 700 East  
Sandy, UT 84070

  
Walter T. Keane

**Exhibit 2 Real Estate Purchase Contract and Addenda**



# REAL ESTATE PURCHASE CONTRACT

COPY 1  
Verona C 107  
DEC with disclosure



This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

## EARNEST MONEY RECEIPT

Buyer Robin and Judith Reese offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of \$3000.00 in the form of Personal Check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: \_\_\_\_\_ on \_\_\_\_\_ (Date)  
(Signature of agent/broker acknowledging receipt of Earnest Money)

Brokerage: RE/MAX Masters Phone Number: 801-453-1166

## OFFER TO PURCHASE

1. PROPERTY: 742 VERONA MEADOWS CT, Murray, Salt Lake County, UT 84107 also described as:

City of Murray County of Salt Lake State of Utah, ZIP 84107 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permanently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: Alarm System, Microwave, Range, Refrigerator

1.2 Excluded Items. The following items are excluded from this sale: \_\_\_\_\_

1.3 Water Rights. The following water rights are included in this sale: \_\_\_\_\_

2. PURCHASE PRICE The purchase price for the Property is \$540,000.00

2.1 Method of Payment. The purchase price will be paid as follows:

\$3000.00 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

\$130,000.00 (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: ☒ CONVENTIONAL ☐ FHA ☐ VA ☐ OTHER (specify) \_\_\_\_\_

If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.

If the loan is to include any particular terms, then check below and give details:

☐ SPECIFIC LOAN TERMS \_\_\_\_\_

\$ \_\_\_\_\_ (c) Loan Assumption Addendum (see attached Assumption Addendum, if applicable)

\$ \_\_\_\_\_ (d) Seller Financing (see attached Seller Financing Addendum, if applicable)

\$ \_\_\_\_\_ (e) Other (specify) \_\_\_\_\_

\$407,000.00 (f) Balance of Purchase Price in Cash at Settlement

\$540,000.00 PURCHASE PRICE. Total of lines (a) through (f)

2.2 Financing Condition. (check applicable box)

(a) ☒ Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c)(the "Loan"). This condition is referred to as the "Financing Condition."

(b) ☐ Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

### 2.3 Application for Loan.

(a) **Buyer's duties.** No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) **Procedure if Loan Application is denied.** If Buyer receives written notice from the Lender that the Lender does not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

**2.4 Appraisal Condition.** Buyer's obligation to purchase the Property ☒ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

**3. SETTLEMENT AND CLOSING.** Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

**4. POSSESSION.** Seller shall deliver physical possession to Buyer within: ☐ \_\_\_\_\_ hours ☐ \_\_\_\_\_ days after closing; ☒ Other (specify) Recording

**5. CONFIRMATION OF AGENCY DISCLOSURE.** At the signing of this Contract:

☐ Seller's Initials [Signature] Buyer's Initials X

The Listing Agent, Donna S Kane, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Listing Broker, Coldwell Banker Residential Brokerage-Salt Lake, represents ☒ Seller ☐ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Selling Agent, Jodi Hansen, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller

as a Limited Agent;

The Selling Broker, RE/MAX Masters, represents ☐ Seller ☒ Buyer ☐ both Buyer and Seller

as a Limited Agent;

**6. TITLE INSURANCE.** At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

**SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide Buyer the following documents which are collectively referred to as the "Seller Disclosures":

- (a) a Seller property condition disclosure for the Property, signed and dated by Seller;
- (b) a commitment for the policy of title insurance;
- (c) a copy of any leases affecting the Property not expiring prior to Closing;
- (d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (e) Other (specify) \_\_\_\_\_

**8. BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS.** Buyer's obligation to purchase under this Contract (check applicable boxes):

- (a) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
- (b) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
- (c) ☐ IS ☒ IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
- (d) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
- (e) ☒ IS ☐ IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) \_\_\_\_\_

Any other deemed necessary by buyers

If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

**8.1 Evaluations & Inspections Deadline.** No later than the Evaluations & Inspections Deadline referenced in Section 4(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

**8.2 Right to Cancel or Object.** If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

**8.3 Failure to Respond.** If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

**8.4 Response by Seller.** If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

**9. ADDITIONAL TERMS.** There ☒ ARE ☐ ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: ☒ Addendum No. 1 ☐ Seller Financing Addendum ☐ FHA/VA Loan Addendum ☐ Assumption Addendum ☐ Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law) ☐ Lead-Based Paint Addendum (in some transactions this addendum is required by law) ☐ Other (specify): \_\_\_\_\_

## 10. SELLER WARRANTIES AND REPRESENTATIONS.

**10.1 Condition of Title.** Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way; and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8.

Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

**10.2 Condition of Property.** Seller warrants that the Property will be in the following condition **ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:**

- (a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense;
- (b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;
- (c) the roof and foundation shall be free of leaks known to Seller;
- (d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and
- (e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

**10.3 Home Warranty Plan.** The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes):  
A one-year Home Warranty Plan ☒ WILL ☐ WILL NOT be included in this transaction. If included, the Home Warranty Plan shall be ordered by ☒ Buyer ☐ Seller and shall be issued by a company selected by ☒ Buyer ☐ Seller. The cost of the Home Warranty Plan shall not exceed \$ 450.00 and shall be paid for at Settlement by ☐ Buyer ☒ Seller.

**11. WALK-THROUGH INSPECTION.** Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the items are not as represented, Seller will, prior to Settlement, replace, correct or repair the items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

**12. CHANGES DURING TRANSACTION.** Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

**13. AUTHORITY OF SIGNERS.** If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

**14. COMPLETE CONTRACT.** This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

**15. DISPUTE RESOLUTION.** The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)  
☐ SHALL

☒ MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

**16. DEFAULT.** If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

**17. ATTORNEY FEES AND COSTS.** In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

**18. NOTICES.** Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

**19. ABROGATION.** Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

**20. RISK OF LOSS.** All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

**21. TIME IS OF THE ESSENCE.** Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, Notice of Loan Denial, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

**22. FAX TRANSMISSION AND COUNTERPARTS.** Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

**23. ACCEPTANCE.** "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

**24. CONTRACT DEADLINES.** Buyer and Seller agree that the following deadlines shall apply to this Contract:

a) Loan Application & Fee Deadline December 21, 2007 (Date)

(b) Seller Disclosure Deadline December 27, 2007 (Date)

(c) Evaluations & Inspections Deadline January 5, 2008 (Date)

(d) Loan Denial Deadline January 5, 2008 (Date)

(e) Appraisal Deadline January 5, 2008 (Date)

(f) Settlement Deadline January 10, 2008 (Date)

**25. OFFER AND TIME FOR ACCEPTANCE.** Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 6:00 [ ] AM [X] PM Mountain Time on December 19, 2007 (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

X Robin Reese 12/18/07 Judith Reese 12/18/07  
(Buyer's Signature) (Offer Date) (Buyer's Signature) (Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

Robin and Judith Reese X \_\_\_\_\_  
(Buyers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

# ACCEPTANCE/COUNTEROFFER/REJECTION

## CHECK ONE:

☐ **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.

☐ **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. \_\_\_\_\_

\_\_\_\_\_  
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

\_\_\_\_\_  
(Sellers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

☐ **REJECTION:** Seller rejects the foregoing offer.

\_\_\_\_\_  
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

## \*\*\*\*\* DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures:

\_\_\_\_\_  
(Buyer's Signature) (Date) (Buyer's Signature) (Date)

\_\_\_\_\_  
(Seller's Signature) (Date) (Seller's Signature) (Date)

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be ☐ faxed ☐ mailed ☐ hand delivered on \_\_\_\_\_ (Date), postage prepaid, to the ☐ Seller ☐ Buyer.

Sent/Delivered by (specify) \_\_\_\_\_

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.





# ADDENDUM NO. 1 TO REAL ESTATE PURCHASE CONTRACT

Handwritten: Addendum 1 to K



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of December 18, 2007 including all prior addenda and counteroffers, between Robin and Judith Reese as Buyer, and \_\_\_\_\_ as Seller, regarding the Property located at 742 VERONA MEADOWS CT. Murray, Salt Lake County, UT 84107. The following terms are hereby incorporated as part of the REPC:

## 1. SUBJECT TO SALE OF BUYER'S RESIDENCE

1.1 Subject to Sale of Buyer's Residence. Buyer's obligation to purchase the Property is conditioned upon the closing of the sale of Buyer's residence located at: 5886 Denaries Cir. Salt Lake City UT 84121 (the "Residence") by 5:00 P.M. (MST) on the 10th day of January, 2008 (the "Residence Closing Deadline").

1.2 Status. Buyer ☒ DOES ☐ DOES NOT have a signed contract for the sale of the Residence. The Residence ☒ IS ☐ IS NOT presently listed for sale through (provide name/address/phone of real estate brokerage): RE/MAX Masters / 7070 South 2300 East. / 801-453-1166 If the Residence is not now listed, it will be so listed on or before the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. Buyer will diligently pursue the closing of the sale of the Residence.

1.3 Right to Cancel. If the sale of the Residence is not closed by the Residence Closing Deadline, Buyer or Seller may, within three calendar days after the Residence Closing Deadline, cancel the REPC by providing written notice to the other party. In the event of such cancellation, the Earnest Money Deposit shall be released to Buyer. Buyer may however, remove this condition at any time prior to the Residence Closing Deadline by providing written notice to Seller.

1. Seller agrees to pay up to \$4000.00 towards buyers closing cost.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☒ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: \_\_\_\_\_

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 6:00 ☐ AM ☒ PM Mountain Time on December 19, 2007 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Robin Reese 12/18/07 10:30 PM Judith Reese 12/18/07 10:30 PM  
☒ Buyer ☐ Seller Signature (Date) (Time) ☒ Buyer ☐ Seller Signature (Date) (Time)

## ACCEPTANCE/COUNTEROFFER/REJECTION

### CHECK ONE:

☐ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. \_\_\_\_\_

(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



## ADDENDUM NO. 2 TO REAL ESTATE PURCHASE CONTRACT



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of December 18, 2007 including all prior addenda and counteroffers, between Robin and Judith Reese as Buyer, and \_\_\_\_\_ as Seller, regarding the Property located at 742 VERONA MEADOWS CT. Murray, Salt Lake County, UT 84107. The following terms are hereby incorporated as part of the REPC:

1. Purchase price to be \$540,000
2. Seller will not contribute to closing cost

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☒ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: earnest deposit to be \$5,000

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☐ Seller ☐ Buyer shall have until \_\_\_\_\_ ☐ AM ☐ PM Mountain Time on \_\_\_\_\_ (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 12/18/07 8:45p [Signature] 12/18/07 8:45p  
☐ Buyer ☒ Seller Signature (Date) (Time) ☐ Buyer ☒ Seller Signature (Date) (Time)

### ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

☐ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. \_\_\_\_\_

(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL,  
EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



# ADDENDUM NO. 3 TO REAL ESTATE PURCHASE CONTRACT



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of December 18, 2007 including all prior addenda and counteroffers, between Robin and Judith Reese as Buyer, and \_\_\_\_\_ as Seller, regarding the Property located at 742 VERONA MEADOWS CT, Murray, Salt Lake County, UT 84107. The following terms are hereby incorporated as part of the REPC:

1. Purchase price to be \$460,000 per appraised value.
2. If seller does not agree to the new purchase price contract will be canceled.
2. Earnest Money to be returned to Buyers

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX); ☒ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: \_\_\_\_\_

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 6:00 ☐ AM ☒ PM Mountain Time on December 29, 2007 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[Signature] 12/18/07 3:55 PM [Signature] 12/18/07 3:55 PM  
☒ Buyer ☐ Seller Signature (Date) (Time) ☒ Buyer ☐ Seller Signature (Date) (Time)

## ACCEPTANCE/COUNTEROFFER/REJECTION

### CHECK ONE:

☐ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. \_\_\_\_\_

(Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.



# **ADDENDUM NO. 4** **TO** **REAL ESTATE PURCHASE CONTRACT**



THIS IS AN ☒ ADDENDUM ☐ COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of December 18, 2008 including all prior addenda and counteroffers, between Robin and Judith Reese as Buyer, and Margaret and Endre Glenn as Seller, regarding the Property located at 742 VERONA MEADOWS CT, Murray, Salt Lake County, UT 84107. The following terms are hereby incorporated as part of the REPC:

1. Seller has failed to respond to addendum #3. Buyers are canceling this contract based upon the appraised value coming in at 460,000 and the seller not accepting the value as the purchase price.
2. Earnest money of \$5000.00 to be released to Buyers.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): ☒ REMAIN UNCHANGED ☐ ARE CHANGED AS FOLLOWS: \_\_\_\_\_

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. ☒ Seller ☐ Buyer shall have until 12:00 ☐ AM ☒ PM Mountain Time on January 1, 2009 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

Robin Reese 12/18/08 2:00 p.m. Margaret Glenn 12/18/08 12:31 p.m.  
☒ Buyer ☐ Seller Signature (Date) (Time) ☒ Buyer ☐ Seller Signature (Date) (Time)

## **ACCEPTANCE/COUNTEROFFER/REJECTION**

### **CHECK ONE:**

☐ ACCEPTANCE: ☐ Seller ☐ Buyer hereby accepts the terms of this ADDENDUM.

☐ COUNTEROFFER: ☐ Seller ☐ Buyer presents as a counteroffer the terms of attached ADDENDUM NO. \_\_\_\_\_

\_\_\_\_\_  
 (Signature) (Date) (Time) (Signature) (Date) (Time)

☐ REJECTION: ☐ Seller ☐ Buyer rejects the foregoing ADDENDUM.

\_\_\_\_\_  
 (Signature) (Date) (Time) (Signature) (Date) (Time)

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL, EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

**Exhibit 3 2009 Real Estate Purchase Contract form**

# REAL ESTATE PURCHASE CONTRACT

This is a legally binding Real Estate Purchase Contract ("REPC"). Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

## OFFER TO PURCHASE AND EARNEST MONEY DEPOSIT

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ ("Offer Reference Date") \_\_\_\_\_ ("Buyer") offers to purchase from \_\_\_\_\_ ("Seller") the Property described below and ☐ delivers to the Buyer's Brokerage with this offer, or ☐ agrees to deliver no later than four (4) calendar days after Acceptance (as defined in Section 23), Earnest Money in the amount of \$\_\_\_\_\_ in the form of \_\_\_\_\_. After Acceptance of the REPC by Buyer and Seller, and receipt of the Earnest Money by the Brokerage, the Brokerage shall have four (4) calendar days in which to deposit the Earnest Money into the Brokerage Real Estate Trust Account.

Buyer's Brokerage \_\_\_\_\_ Phone: \_\_\_\_\_

Received by: \_\_\_\_\_ on \_\_\_\_\_ (Date)  
(Signature above acknowledges receipt of Earnest Money)

## OTHER PROVISIONS

### 1. PROPERTY: \_\_\_\_\_

also described as: \_\_\_\_\_

City of \_\_\_\_\_, County of \_\_\_\_\_, State of Utah, Zip \_\_\_\_\_ (the "Property"). Any reference below to the term "Property" shall include the Property described above, together with the Included Items and water rights/water shares, if any, referenced in Sections 1.1, 1.2 and 1.4.

**1.1 Included Items.** Unless excluded herein, this sale includes the following items if presently owned and in place on the Property: plumbing, heating, air conditioning fixtures and equipment; ovens, ranges and hoods; cook tops; dishwashers; ceiling fans; water heaters; light fixtures and bulbs; bathroom fixtures and bathroom mirrors; curtains, draperies, rods, window blinds and shutters; window and door screens; storm doors and windows; awnings; satellite dishes; affixed carpets; automatic garage door openers and accompanying transmitters; security system; fencing and any landscaping.

**1.2 Other Included Items.** The following items that are presently owned and in place on the Property have been left for the convenience of the parties and are also included in this sale (check applicable box): ☐ washers ☐ dryers ☐ refrigerators ☐ water softeners ☐ microwave ovens ☐ other (specify) \_\_\_\_\_

The above checked items shall be conveyed to Buyer under separate bill of sale with warranties as to title.

**1.3 Excluded Items.** The following items are excluded from this sale: \_\_\_\_\_

**1.4 Water Service.** The Purchase Price for the Property shall include all water rights/water shares, if any, that are the legal source for Seller's current culinary water service and irrigation water service, if any, to the Property. The water rights/water shares will be conveyed or otherwise transferred to Buyer at Closing by applicable deed or legal instruments. The following water rights/water shares, if applicable, are specifically excluded from this sale: \_\_\_\_\_

**2. PURCHASE PRICE.** The Purchase Price for the Property is \$ \_\_\_\_\_. Except as provided in this Section, the Purchase Price shall be paid as provided in Sections 2(a) through 2(d) below. Any amounts shown in 2(b) and 2(d) may be adjusted as deemed necessary by Buyer and the Lender.

\$ \_\_\_\_\_ (a) **Earnest Money Deposit.** Under certain conditions described in the REPC, this deposit may become totally non refundable.

\$ \_\_\_\_\_ (b) **New Loan.** Buyer may apply for mortgage loan financing (the "Loan") on terms acceptable to Buyer. If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.

\$ \_\_\_\_\_ (c) **Seller Financing** (see attached Seller Financing Addendum)

\$ \_\_\_\_\_ (d) **Balance of Purchase Price in Cash at Settlement**

\$ \_\_\_\_\_ **PURCHASE PRICE. Total of lines (a) through (d)**

### 3. SETTLEMENT AND CLOSING.

**3.1 Settlement.** Settlement shall take place no later than the Settlement Deadline referenced in Section 24(d), or as otherwise mutually agreed by Buyer and Seller in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by the REPC, by the Lender, by the title insurance and escrow/closing offices, by written escrow instructions (including any split closing instructions, if applicable), or by applicable law; (b) any monies required to be paid by Buyer or Seller under these documents (except for the proceeds of any new loan) have been delivered by Buyer or Seller to the other party, or to the escrow/closing office, in the form of cash, wire transfer, cashier's check, or other form acceptable to the escrow/closing office.

**3.2 Prorations.** All prorations, including, but not limited to, homeowner's association dues, property taxes for the current year, rents, and interest on assumed obligations, if any, shall be made as of the Settlement Deadline referenced in Section 24(d), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The provisions of this Section 3.2 shall survive Closing.

**3.3 Special Assessments.** Any assessments for capital improvements as approved by the HOA (pursuant to HOA governing documents) or as assessed by a municipality or special improvement district, prior to the Settlement Deadline shall be paid for by: ☐ Seller ☐ Buyer ☐ Split Equally Between Buyer and Seller ☐ Other (explain) \_\_\_\_\_.

The provisions of this Section 3.3 shall survive Closing.

**3.4 Fees/Costs/Payment Obligations.** Unless otherwise agreed to in writing, Seller and Buyer shall each pay one-half (1/2) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Buyer agrees to be responsible for homeowners' association and private and public utility service transfer fees, if any, and all utilities and other services provided to the Property after the Settlement Deadline. The escrow/closing office is authorized and directed to withhold from Seller's proceeds at Closing, sufficient funds to pay off on Seller's behalf all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. The provisions of this Section 3.4 shall survive Closing.

**3.5 Closing.** For purposes of the REPC, "Closing" means that: (a) Settlement has been completed; (b) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (c) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in 3.5 (b) and (c) shall be completed within four calendar days after Settlement.

**4. POSSESSION.** Seller shall deliver physical possession of the Property to Buyer as follows: ☐ Upon Closing; ☐ \_\_\_\_\_ Hours after Closing; ☐ \_\_\_\_\_ Calendar Days after Closing. Any contracted rental of the Property prior to or after Closing, between Buyer and Seller, shall be by separate written agreement. Seller and Buyer shall each be responsible for any insurance coverage each party deems necessary for the Property including any personal property and belongings. Seller agrees to deliver the Property to Buyer in broom-clean condition and free of debris and personal belongings. Any Seller or tenant moving-related damage to the Property shall be repaired at Seller's expense. The provisions of this Section 4 shall survive Closing.

**5. CONFIRMATION OF AGENCY DISCLOSURE.** Buyer and Seller acknowledge prior written receipt of agency disclosure provided by their respective agent that has disclosed the agency relationships confirmed below. At the signing of the REPC:

Seller's Agent \_\_\_\_\_, represents ☐ Seller ☐ both Buyer and Seller as a Limited Agent;

Seller's Brokerage \_\_\_\_\_, represents ☐ Seller ☐ both Buyer and Seller as a Limited Agent;

Buyer's Agent \_\_\_\_\_, represents ☐ Buyer ☐ both Buyer and Seller as a Limited Agent;

Buyer's Brokerage \_\_\_\_\_, represents ☐ Buyer ☐ both Buyer and Seller as a Limited Agent.

### 6. TITLE & TITLE INSURANCE.

**6.1 Title to Property.** Seller represents that Seller has fee title to the Property and will convey marketable title to the Property to Buyer at Closing by general warranty deed. Buyer does agree to accept title to the Property subject to the contents of the Commitment for Title Insurance (the "Commitment") provided by Seller under Section 7, and as reviewed and approved by Buyer under Section 8. Buyer also agrees to accept title to the Property subject to any existing leases, rental and property management agreements affecting the Property not expiring prior to Closing which were provided to Buyer pursuant to Section 7(e). The provisions of this Section 6.1 shall survive Closing.

**6.2 Title Insurance.** At Settlement, Seller agrees to pay for and cause to be issued in favor of Buyer, through the title insurance agency that issued the Commitment (the "Issuing Agent"), the most current version of the *ALTA Homeowner's Policy of Title Insurance* (the "Homeowner's Policy"). If the *Homeowner's Policy* is not available through the Issuing Agent, Buyer and Seller further agree as follows: (a) Seller agrees to pay for the *Homeowner's Policy* if available

through any other title insurance agency selected by Buyer; (b) if the *Homeowner's Policy* is not available either through the Issuing Agent or any other title insurance agency, then Seller agrees to pay for, and Buyer agrees to accept, the most current available version of an *ALTA Owner's Policy of Title Insurance* ("Standard Coverage Owner's Policy") available through the Issuing Agent.

**7. SELLER DISCLOSURES.** No later than the Seller Disclosure Deadline referenced in Section 24(a), Seller shall provide to Buyer the following documents in hard copy or electronic format which are collectively referred to as the "Seller Disclosures":

- (a) a written Seller property condition disclosure for the Property, completed, signed and dated by Seller as provided in Section 10.3;
- (b) a Commitment for Title Insurance as referenced in Section 6;
- (c) a copy of any restrictive covenants (CC&R's), rules and regulations affecting the Property;
- (d) a copy of the most recent minutes, budget and financial statement for the homeowners' association, if any;
- (e) a copy of any lease, rental, and property management agreements affecting the Property not expiring prior to Closing;
- (f) evidence of any water rights and/or water shares referenced in Section 1.4;
- (g) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
- (h) Other (specify) \_\_\_\_\_

## **8. BUYER'S CONDITIONS OF PURCHASE.**

**8.1 DUE DILIGENCE CONDITION.** Buyer's obligation to purchase the Property: ☐ IS ☐ IS NOT conditioned upon Buyer's Due Diligence as defined in this Section 8.1(a) below. This condition is referred to as the "Due Diligence Condition." If checked in the affirmative, Sections 8.1(a) through 8.1(c) apply; otherwise they do not.

**(a) Due Diligence Items.** Buyer's Due Diligence shall consist of Buyer's review and approval of the contents of the Seller Disclosures referenced in Section 7, and any other tests, evaluations and verifications of the Property deemed necessary or appropriate by Buyer, such as: the physical condition of the Property; the existence of any hazardous substances, environmental issues or geologic conditions; the square footage or acreage of the land and/or improvements; the condition of the roof, walls, and foundation; the condition of the plumbing, electrical, mechanical, heating and air conditioning systems and fixtures; the condition of all appliances; the costs and availability of homeowners' insurance and flood insurance, if applicable; water source, availability and quality; the location of property lines; regulatory use restrictions or violations; fees for services such as HOA dues, municipal services, and utility costs; convicted sex offenders residing in proximity to the Property; and any other matters deemed material to Buyer in making a decision to purchase the Property. Unless otherwise provided in the REPC, all of Buyer's Due Diligence shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with Buyer's Due Diligence. Buyer agrees to pay for any damage to the Property resulting from any such inspections or tests during the Due Diligence.

**(b) Buyer's Right to Cancel or Resolve Objections.** If Buyer determines, in Buyer's sole discretion, that the results of the Due Diligence are unacceptable, Buyer may either: (i) no later than the Due Diligence Deadline referenced in Section 24(b), cancel the REPC by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer without the requirement of further written authorization from Seller; or (ii) no later than the Due Diligence Deadline referenced in Section 24(b), resolve in writing with Seller any objections Buyer has arising from Buyer's Due Diligence.

**(c) Failure to Cancel or Resolve Objections.** If Buyer fails to cancel the REPC or fails to resolve in writing any objections Buyer has arising from Buyer's Due Diligence, as provided in Section 8.1(b), Buyer shall be deemed to have waived the Due Diligence Condition.

**8.2 APPRAISAL CONDITION.** Buyer's obligation to purchase the Property: ☐ IS ☐ IS NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition." If checked in the affirmative, Sections 8.2(a) and 8.2(b) apply; otherwise they do not.

**(a) Buyer's Right to Cancel.** If after completion of an appraisal by a licensed appraiser, Buyer receives written notice from the Lender or the appraiser that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel the REPC by providing written notice to Seller (with a copy of the Notice of Appraised Value) no later than the Financing & Appraisal Deadline referenced in Section 24(c); whereupon the Earnest Money Deposit shall be released to Buyer without the requirement of further written authorization from Seller.

**(b) Failure to Cancel.** If the REPC is not cancelled as provided in this section 8.2, Buyer shall be deemed to have waived the Appraisal Condition.

**8.3 FINANCING CONDITION.** Buyer's obligation to purchase the property: ☐ IS ☐ IS NOT conditioned upon Buyer obtaining the Loan referenced in Section 2(b). This condition is referred to as the "Financing Condition." If checked in the affirmative, Sections 8.3(a) and 8.3(b) apply; otherwise they do not. If the Financing Condition applies, Buyer agrees to work diligently and in good faith to obtain the Loan.



**(a) Buyer's Right to Cancel Before the Financing & Appraisal Deadline.** If Buyer, in Buyer's sole discretion, is not satisfied with the terms and conditions of the Loan, Buyer may cancel the REPC by providing written notice to Seller no later than the Financing & Appraisal Deadline referenced in Section 24(c); whereupon the Earnest Money Deposit shall be released to Buyer without the requirement of further written authorization from Seller.

**(b) Buyer's Right to Cancel After the Financing & Appraisal Deadline.** If after expiration of the Financing & Appraisal Deadline referenced in Section 24(c), Buyer fails to obtain the Loan, meaning that the proceeds of the Loan have not been delivered by the Lender to Seller or to the escrow/closing office as required under Section 3.5 of the REPC, then Buyer or Seller may cancel the REPC by providing written notice to the other party; whereupon the Earnest Money Deposit, or Deposits, if applicable (see Section 8.4 below), shall be released to Seller without the requirement of further written authorization from Buyer. In the event of such cancellation, Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit, or Deposits, if applicable, as liquidated damages. Buyer and Seller agree that liquidated damages would be difficult and impractical to calculate, and the Earnest Money Deposit, or Deposits, if applicable, is a fair and reasonable estimate of Seller's damages in the event Buyer fails to obtain the Loan.

**8.4 ADDITIONAL EARNEST MONEY DEPOSIT.** If the REPC has not been previously canceled by Buyer as provided in Sections 8.1, 8.2 or 8.3(a), then no later than the Due Diligence Deadline referenced in Section 24(b), or the Financing & Appraisal Deadline referenced in Section 24(c), whichever is later, Buyer: ☐ **WILL** ☐ **WILL NOT** deliver to the Buyer's Brokerage, an Additional Earnest Money Deposit in the amount of \$\_\_\_\_\_. The Earnest Money Deposit and the Additional Earnest Money Deposit, if applicable, are sometimes referred to herein as the "Deposits". The Earnest Money Deposit, or Deposits, if applicable, shall be credited toward the Purchase Price at Closing.

**9. ADDENDA.** There ☐ **ARE** ☐ **ARE NOT** addenda to the REPC containing additional terms. If there are, the terms of the following addenda are incorporated into the REPC by this reference: ☐ **Addendum No.** \_\_\_\_\_  
☐ **Seller Financing Addendum** ☐ **FHA/VA Loan Addendum** ☐ **Lead-Based Paint Disclosure & Acknowledgement**  
**(in some transactions this disclosure is required by law)** ☐ **Other (specify)** \_\_\_\_\_

**10. HOME WARRANTY PLAN / AS-IS CONDITION OF PROPERTY.**

**10.1 Home Warranty Plan.** A one-year Home Warranty Plan ☐ **WILL** ☐ **WILL NOT** be included in this transaction. If included, the Home Warranty Plan shall be ordered by ☐ **Buyer** ☐ **Seller** and shall be issued by a company selected by ☐ **Buyer** ☐ **Seller**. The cost of the Home Warranty Plan shall not exceed \$\_\_\_\_\_ and shall be paid for at Settlement by ☐ **Buyer** ☐ **Seller**.

**10.2 Condition of Property/Buyer Acknowledgements.** Buyer acknowledges and agrees that in reference to the physical condition of the Property: (a) Buyer is purchasing the Property in its "As-Is" condition without expressed or implied warranties of any kind; (b) Buyer shall have, during Buyer's Due Diligence as referenced in Section 8.1, an opportunity to completely inspect and evaluate the condition of the Property; and (c) if based on the Buyer's Due Diligence, Buyer elects to proceed with the purchase of the Property, Buyer is relying wholly on Buyer's own judgment and that of any contractors or inspectors engaged by Buyer to review, evaluate and inspect the Property.

**10.3 Condition of Property/Seller Acknowledgements.** Seller acknowledges and agrees that in reference to the physical condition of the Property, Seller agrees to: (a) disclose in writing to Buyer defects in the Property known to Seller that materially affect the value of the Property that cannot be discovered by a reasonable inspection by an ordinary prudent Buyer; (b) carefully review, complete, and provide to Buyer a written Seller property condition disclosure as stated in section 7(a); and (c) deliver the Property to Buyer in substantially the same general condition as it was on the date of Acceptance, as defined in Section 23, ordinary wear and tear excepted. The provisions of Sections 10.2 and 10.3 shall survive Closing.

**11. FINAL PRE-SETTLEMENT WALK-THROUGH INSPECTION.**

**11.1 Walk-Through Inspection.** No earlier than seven (7) calendar days prior to Settlement, and upon reasonable notice and at a reasonable time, Buyer may conduct a final pre-Settlement walk-through inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 1.2 and 8.1(b)(ii) ("the items") are respectively present, repaired or corrected as agreed. The failure to conduct a walk-through inspection or to claim that an item is not as represented shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented. If the items are not as represented, Seller agrees to cause all applicable items to be corrected, repaired or replaced (the "Work") prior to the Settlement Deadline referenced in Section 24(d).

**11.2 Escrow to Complete the Work.** If, as of Settlement, the Work has not been completed, then Buyer and Seller agree to withhold in escrow at Settlement a reasonable amount agreed to by Seller, Buyer (and Lender, if applicable), sufficient to pay for completion of the Work. If the Work is not completed within thirty (30) calendar days after the Settlement Deadline, the amount so escrowed may, subject to Lender's approval, be released to Buyer as liquidated damages for failure to complete the Work. The provisions of this Section 11.2 shall survive Closing.

**12. CHANGES DURING TRANSACTION.** Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any leases, rental or property

management agreements shall be made; (b) no new lease, rental or property management agreements shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; (d) no further financial encumbrances to the Property shall be made, and (e) no changes in the legal title to the Property shall be made.

**13. AUTHORITY OF SIGNERS.** If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company or other entity, the person signing the REPC on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

**14. COMPLETE CONTRACT.** The REPC together with its addenda, any attached exhibits, and Seller Disclosures (collectively referred to as the "REPC"), constitutes the entire contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties whether verbal or otherwise. The REPC cannot be changed except by written agreement of the parties.

**15. MEDIATION.** Any dispute relating to the REPC arising prior to or after Closing: ☐ **SHALL** ☐ **MAY AT THE OPTION OF THE PARTIES** first be submitted to mediation. Mediation is a process in which the parties meet with an impartial person who helps to resolve the dispute informally and confidentially. Mediators cannot impose binding decisions. The parties to the dispute must agree before any settlement is binding. The parties will jointly appoint an acceptable mediator and share equally in the cost of such mediation. If mediation fails, the other procedures and remedies available under the REPC shall apply. Nothing in this Section 15 prohibits any party from seeking emergency legal or equitable relief, pending mediation. The provisions of this Section 15 shall survive Closing.

**16. DEFAULT.**

**16.1 Buyer Default.** If Buyer defaults, Seller may elect one of the following remedies: (a) cancel the REPC and retain the Earnest Money Deposit, or Deposits, if applicable, as liquidated damages; (b) maintain the Earnest Money Deposit, or Deposits, if applicable, in trust and sue Buyer to specifically enforce the REPC; or (c) return the Earnest Money Deposit, or Deposits, if applicable, to Buyer and pursue any other remedies available at law.

**16.2 Seller Default.** If Seller defaults, Buyer may elect one of the following remedies: (a) cancel the REPC, and in addition to the return of the Earnest Money Deposit, or Deposits, if applicable, Buyer may elect to accept from Seller, as liquidated damages, a sum equal to the Earnest Money Deposit, or Deposits, if applicable; or (b) maintain the Earnest Money Deposit, or Deposits, if applicable, in trust and sue Seller to specifically enforce the REPC; or (c) accept a return of the Earnest Money Deposit, or Deposits, if applicable, and pursue any other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand.

**17. ATTORNEY FEES AND COSTS/GOVERNING LAW.** In the event of litigation or binding arbitration to enforce the REPC, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15. This contract shall be governed by and construed in accordance with the laws of the State of Utah. The provisions of this Section 17 shall survive Closing.

**18. NOTICES.** Except as provided in Section 23, all notices required under the REPC must be: (a) in writing; (b) signed by the Buyer or Seller giving notice; and (c) received by the Buyer or the Seller, or their respective agent, or by the brokerage firm representing the Buyer or Seller, no later than the applicable date referenced in the REPC.

**19. NO ASSIGNMENT.** The REPC and the rights and obligations of Buyer hereunder, are personal to Buyer. The REPC may not be assigned by Buyer without the prior written consent of Seller. Provided, however, the transfer of Buyer's interest in the REPC to any business entity in which Buyer holds a legal interest, including, but not limited to, a family partnership, family trust, limited liability company, partnership, or corporation (collectively referred to as a "Permissible Transfer"), shall not be treated as an assignment by Buyer that requires Seller's prior written consent. Furthermore, the inclusion of "and/or assigns" or similar language on the line identifying Buyer on the first page of the REPC shall constitute Seller's written consent only to a Permissible Transfer.

**20. INSURANCE & RISK OF LOSS.**

**20.1 Insurance Coverage.** As of Closing, Buyer shall be responsible to obtain casualty and liability insurance coverage on the Property in amounts acceptable to Buyer and Buyer's Lender, if applicable.

**20.2 Risk of Loss.** If prior to Closing, any part of the Property is damaged or destroyed by fire, vandalism, flood, earthquake, or act of God, the risk of such loss or damage shall be borne by Seller; provided however, that if the cost of repairing such loss or damage would exceed ten percent (10%) of the Purchase Price referenced in Section 2, either Seller or Buyer may elect to cancel the REPC by providing written notice to the other party, in which instance the Earnest Money Deposit, or Deposits, if applicable, shall be returned to Buyer.

**21. TIME IS OF THE ESSENCE.** Time is of the essence regarding the dates set forth in the REPC. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in the REPC: (a) performance under each Section of the REPC which references a date shall absolutely be required by 5:00 PM Mountain Time on the stated date; and (b) the term "days" and "calendar days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (e.g. Acceptance). Performance dates and times referenced herein shall not be

binding upon title companies, lenders, appraisers and others not parties to the REPC, except as otherwise agreed to in writing by such non-party.

**22. ELECTRONIC TRANSMISSION AND COUNTERPARTS.** Electronic transmission (including email and fax) of a signed copy of the REPC, any addenda and counteroffers, and the retransmission of any signed electronic transmission shall be the same as delivery of an original. The REPC and any addenda and counteroffers may be executed in counterparts.

**23. ACCEPTANCE.** "Acceptance" occurs **only** when **all** of the following have occurred: (a) Seller or Buyer has signed the offer or counteroffer where noted to indicate acceptance; and (b) Seller or Buyer or their agent has communicated to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

**24. CONTRACT DEADLINES.** Buyer and Seller agree that the following deadlines shall apply to the REPC:

(a) **Seller Disclosure Deadline** \_\_\_\_\_ (Date)

(b) **Due Diligence Deadline** \_\_\_\_\_ (Date)

(c) **Financing & Appraisal Deadline** \_\_\_\_\_ (Date)

(d) **Settlement Deadline** \_\_\_\_\_ (Date)

**25. OFFER AND TIME FOR ACCEPTANCE.** Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: \_\_\_\_\_ [ ] AM [ ] PM Mountain Time on \_\_\_\_\_ (Date), this offer shall lapse; and the Brokerage shall return any Earnest Money Deposit to Buyer.

\_\_\_\_\_  
(Buyer's Signature) (Offer Date) (Buyer's Signature) (Offer Date)

\_\_\_\_\_  
(Buyer's Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

\_\_\_\_\_  
(Buyer's Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

#### ACCEPTANCE/COUNTEROFFER/REJECTION

**CHECK ONE:**

[ ] **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.

[ ] **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. \_\_\_\_\_.

[ ] **REJECTION:** Seller rejects the foregoing offer.

\_\_\_\_\_  
(Seller's Signature) (Date) (Time) (Seller's Signature) (Date)(Time)

\_\_\_\_\_  
(Seller's Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

\_\_\_\_\_  
(Seller's Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)